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No. 90-539  

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IN THE

Supreme Court of the United States

October Term, 1990

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CAROLYN SONNENBERG, GORDON SONNENBERG,  
MARY CARHOUN McCORMICK, JEFF CARHOUN  
SCOTT CARHOUN, GERRY CARROLL,  
KATHERINE CARROLL, CHRISTOPHER CARROLL,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

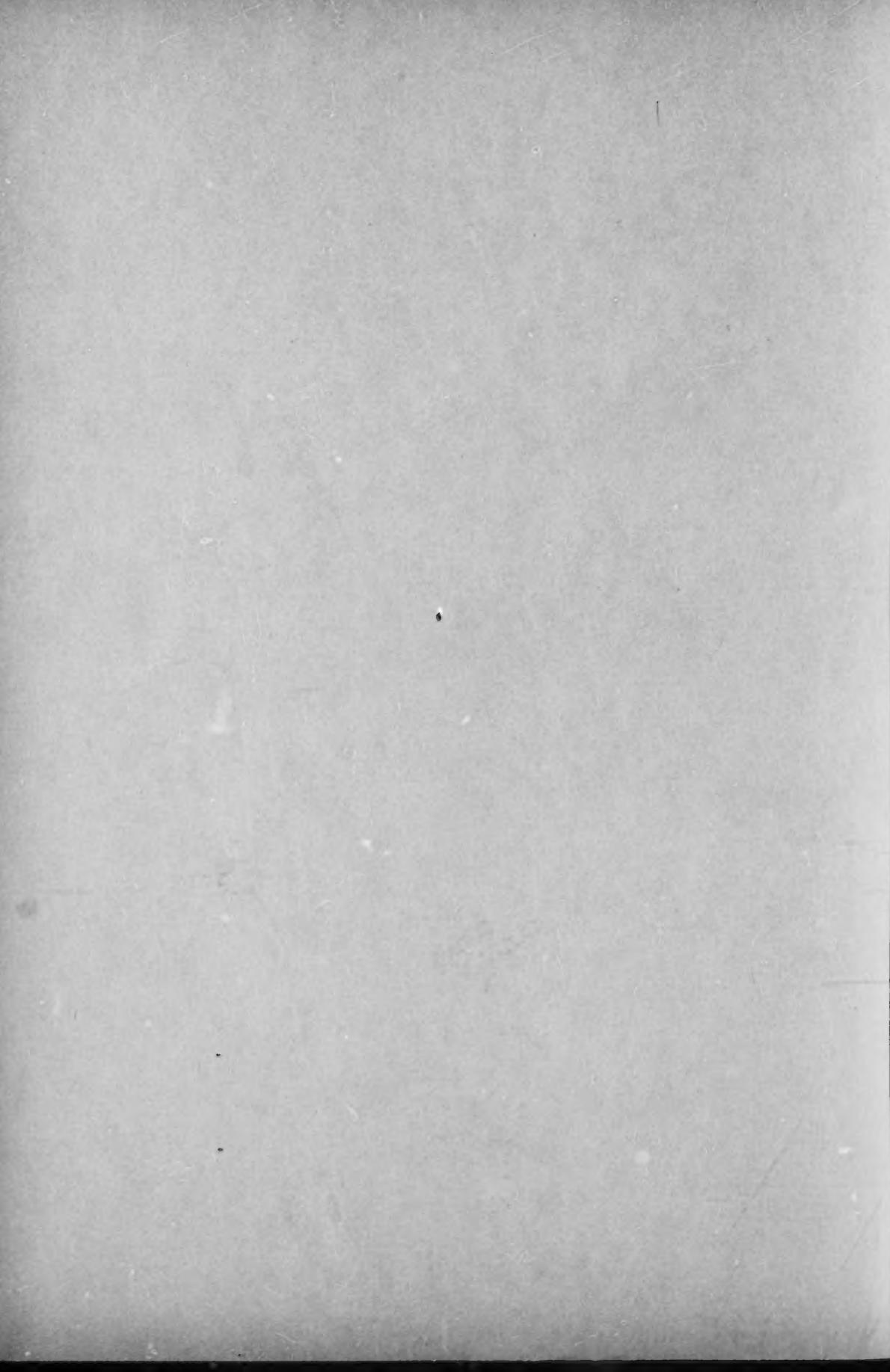
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BRIEF OF AMICI CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND  
CONCERNED AMERICANS FOR MILITARY  
IMPROVEMENT  
IN SUPPORT OF PETITIONERS

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Michael C. Maher, Esq.  
1050 31st St., N.W.  
Washington, DC 20007  
(202) 965-3500  
*President, Association of  
Trial Lawyers of America*

Russell H. Putnam, Jr.\*  
1022 Calhoun St.  
Columbia, S.C. 29211  
(803) 799-9435  
*Attorney for Amici Curiae*  
\*Counsel of Record



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IDENTITY AND INTEREST OF AMICI CURIAE

This amicus curiae brief supports the position of Petitioner. Letters from all parties to this action granting their consent to the filing of this brief are on file with the Clerk of this Court.

The Association of Trial Lawyers of America [ATLA] is a voluntary bar association of approximately 65,000 trial attorneys from across the country. ATLA members primarily represent injured victims of tortious conduct, as well as plaintiffs in civil rights actions and criminal defendants. ATLA members frequently represent members of the Armed Services and their families in their efforts to obtain civil redress for injury. Many ATLA members, particularly those active in ATLA's Military Law Section, are themselves members of the Armed Services and are familiar with the special legal problems faced by servicemembers.

ATLA believes that the right to seek just compensation for negligently or wrongfully inflicted injury is a fundamental element of our civil justice system. The fact that servicemembers are deprived of a remedy for governmental negligence which is afforded other citizens is a grave inequity. The fact that many servicemembers are presently called upon to make the ultimate sacrifice for their country heightens the need to ensure their fair treatment under the law. ATLA believes that its analysis of the *Feres* doctrine and its rationale will assist this Court in its assessing the merits of the Petition.

Concerned Americans for Military Improvement [CAMI] is a nationwide, nonpartisan, non-profit organization dedicated to improving the rights, benefits, and entitlements of members of the Armed Forces of the United States as well as their spouses, children, and heirs. CAMI is actively involved in efforts to persuade Congress to amend the Federal Tort Claims Act to permit active duty servicemembers and their families to maintain actions for medical malpractice. In addition, CAMI participated as amicus curiae in *Conez v. United States*, 854 F.2d 723 (5th Cir. 1988), opposing the extension of the *Feres* doctrine to bar medical malpractice claims by individuals on the Temporary Disability Retirement List of the Armed Forces.

CAMI has a particular interest in this case because the rights of servicemembers under the FTCA will be directly affected by this Court's action with respect to the *Feres* doctrine.

## REASONS FOR GRANTING THE WRIT

### I. THE *FERES* DOCTRINE IS UNSOUND AS A MATTER OF MILITARY POLICY AND LAW.

When it enacted the Federal Tort Claims Act [FTCA], Congress eliminated most of the sovereign immunity of the United States. *United States v. Johnson*, 481 U.S. 681, 692 (1987) (Scalia, J. dissenting). In clear language, Congress created a remedy for individuals injured by the negligence of a government employee acting within the scope of his or her employment. Congress provided twelve exceptions to the general waiver of immunity. 28 U.S.C. §2680. If one or more of the exceptions applies, recovery is barred. *Id.*

Despite the statute's clear language, the Court created a thirteenth exception to the FTCA. This exception, which has become known as the *Feres* doctrine, bars recovery by members of the armed forces for injuries arising out of or incident to their military service. *Feres v. United States*, 340 U.S. 135 (1950). Although in *United States v. Johnson*, 481 U.S. 681 (1987) a bare majority of the Court indicated in dictum its support for the *Feres* doctrine, the fact remains that during the four decades following its establishment, the Court has never subjected the *Feres* doctrine to a critical analysis and review.

In *United States v. Johnson*, 481 U.S. 691 (1987), the

Court emphasized that three broad rationales support the *Feres* doctrine:

- (1) The distinctively federal nature of the relationship between the government and its servicemembers. (The Federal Relationship/Uniformity Rationale);
- (2) The existence of disability and death benefits (Veterans' Benefits Rationale); and
- (3) The fear that negligence actions by servicemembers would require judicial involvement in sensitive military affairs at the expense of military discipline (Military Discipline Rationale).

*Id.* at 688-90.

Amici contend that none of these bases for the *Feres* doctrine can withstand critical analysis. This contention is based on the results of research into the factors which motivate men and women in combat. It is also premised on scholarly and judicial criticism of the *Feres* doctrine and on the plain language of the FTCA.

Amici urge this Court to overrule the *Feres* doctrine. Alternatively, the Court should limit its scope so that it does not bar the claims of servicemembers arising from off-duty activities or recreational accidents. Further, the *Feres* doctrine should not bar a servicemember's medical malpractice claim which arises from pregnancy, elective surgery, or self-referral for treatment.

**A. PRESERVATION OF MILITARY DISCIPLINE DOES NOT JUSTIFY BARRING SERVICEMEMBERS FROM RECOVERY UNDER THE FTCA.**

## **1. High Morale, Not Discipline, Is The Factor Which Is Critical To Ensuring The Successful And Efficient Functioning Of The Armed Services.**

The Military Discipline rationale was not one of the foundations for the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). Perhaps sensing the inherent flaws in the first two *Feres* rationales, the Court later articulated the Military Discipline Rationale as the best support for the doctrine. *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Chappel v. Wallace*, 462 U.S. 296, 299 (1983); *United States v. Muniz*, 374 U.S. 150, 162 (1963). *Brown* explained that the Military Discipline Rationale was based on a fear that FTCA suits by service personnel may have an adverse impact on military discipline. 348 U.S. at 112. In reality, this rationale is the weakest and most erroneous of the *Feres* rationales.

The inherent error and theoretical weakness of the Military Discipline Rationale are reflected in the attempts of lower courts to justify and defend it. Some have stated that suits by service personnel would erode the security and defense of the country. See, e.g., *Jaffee v. United States*, 592 F.2d 712, 717 (3rd Cir. 1979). Others have indicated that "it is the suit, not the recovery, that would be disruptive of military discipline." *Henninger v. United States*, 473 F.2d 814, 815 (5th Cir. 1973). Significantly, these explanations are presented as self-evident, without evidence or logic to support them. Nor have those commentators who approve of *Feres* offered any evidence to support the Discipline Rationale beyond citation to prior decisions. See, e.g., Note, *Why Congress Should Not Legislatively Repeal the Feres Doctrine - A Struggle in Equity*, 18 Tex. Tech. L. Rev. 819 (1987); Note, *In Support of the Feres Doctrine and a Better Definition of "Incidence to Service"*, 56 St. John's L. Rev. 485 (1982).

These pronouncements purport to advance a theory that it is coercion which motivates service personnel. This is the kind of conjecture which this Court rejected in *Muniz*, 374 U.S. at 161 (problems of prison administration caused by FTCA suits are "more a matter of conjecture than reality").

Even at the time *Feres* was decided, overwhelming evidence existed which refuted the premise of the Discipline Rationale. This evidence was the fruit of the research of the Army's historical teams during the Second World War. Their interviews of thousands of soldiers fresh from combat represent the first systematic attempt to study human behavior in combat situations. J. Keegan, *The Face of Battle* 70-71 (1976).

This research produces some startling findings. Most important is that soldiers in combat do not view themselves as part of a hierarchical military organization. Rather, they see themselves as rough equals within small groups of six or seven. Keegan, at 51.

Both General S.L.A. Marshall and Samuel Stouffer have relied on these studies in their seminal works on armies in combat. General Marshall concluded that an army is a social mechanism which is governed by its own laws, customs, and mores. Accordingly, discipline imposed from above is of limited utility in motivating men to fight. Consequently, General Marshall argued that an army should strive to forge and nurture close bonds of friendship which are centered on an individual who is identified as a "natural fighter." Such relationships will ensure that no one shrinks or runs away from battle. S. Marshall, *Men Against Fire* (1947).

Stouffer reached an almost identical conclusion. He

found that 39% of enlisted men surveyed reported that they were motivated by a desire to end the task. Group solidarity was cited by 14% of enlisted personnel and 15% of officers. Only 1% of enlisted men cited discipline as a motivating factor. S. Stouffer, *The American Soldier: Combat and Its Aftermath* 108-09 (1949).

Both officers and enlisted men, however, recognized the importance of strong personal relationships between officers and enlisted personnel. Each group also recognized that an officer's sincere concern for his men was a key component of successful leadership. Ninety-seven percent of the officers believed that a personal concern for the individual welfare of their men was "absolutely necessary." 2 S. Stouffer, Suchman, L. DeVinney, S. Star & R. Williams, Jr., *The American Soldier: Adjustment During Army Life* 385-88 (1949).

Like General Marshall, Stouffer concluded that it was the personal relationship between members of a combat team which was the crucial factor in battle; formal discipline played little, if any, role in the effective functioning of a combat team. *Id.* at 127. See also, J. Baynes, *Morale: A Study of Men and Courage* 253-545 (1967)(listing the factors which created high morale and performance of the 2nd Scottish Rifles in the Battle of Neuve Chappelle, March 9-15, 1915).

Research conducted during the Korean and Vietnam actions confirmed these conclusions. The desire to "get it over and to return home" and identification with a small group were primary motivations of soldiers under fire. This research produced no evidence that "the traditional structure of military discipline contributes to combat effectiveness." D. Cortright, *Soldiers in Revolt* 225 (1975).

Though a soldier's identification with his friends was

often at odds with military authorities, it contributed to combat effectiveness. Little, *Buddy Relations and Combat Performance*, in *The New Military Changing Patterns of Organizations* 195 (M. Janowitz, ed. 1964). Rigid discipline actually erodes morale, loyalty, and efficiency. *Id.* at 225-26. Similar conclusions have been reached concerning the motivation of ancient Greek armies. See generally, V. Hanson, *The Western Way of War: Infantry Battle in Classical Greece* (1989). "In the last analysis," a leading military theorist has stated, "success in battle is a matter of morale." Ardant Du Picq, *Battle Studies: Ancient and Modern Battle* (1946).

Significantly, the keen emphasis by some courts on the importance of military discipline is not reflected in military doctrine or law. For example, neither military doctrine nor law demands unquestioning obedience to orders. Both require servicemembers to ignore or disobey illegal orders. *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973); see generally, R. Rivkin, *The Rights of Servicemen* 105 (1987); J. Tomes, *The Servicemember's Legal Guide* 24-25 (1987).

Additionally, Army doctrine recognizes the value of initiative, rather than blind obedience:

[Initiative] requires a willingness and ability to act independently within the framework of the higher commander's intent . . . [I]nitiative requires audacity which may involve risk-taking and an atmosphere which supports it. . . . In the chaos of battle, it is essential to decentralize decision authority to the lowest practical level because overcentralization slows action and leads to inertia. . . . Decentralization demands subordinates who are willing and able to take risks and superiors who nurture that willingness and ability in their

subordinates.

Department of the Army Field Manual 1005, *Operations* (May 1986) at 15.

Indeed, the power of modern weaponry and the vulnerability of communications systems during battle have made decentralization and initiative, rather than blind obedience to orders, a key operational concept for modern armies. *Id.* One scholar has stated:

Decentralization of tactical control forced on land forces has been one of the most significant features of modern war. In the confused and often chaotic battlefield environments of today, only the smallest of groups are likely to keep together, particularly during crucial movements. . . . Small groups and their leaders must be capable of going it alone . . .

J. English, *A Perspective on Infantry* 282-83 (1981). The United States Army has responded to these studies by reorganizing its structure to take advantage of the dynamics and friendships of small groups. J. Keegan, *The Face of Battle* 51 (1976).

Morale, the Army recognizes, is the glue which binds such groups together into cohesive military units.

Cohesion results from the respect, confidence, *caring* and communication that binds members of a unit together - mentally, emotionally and spiritually. The level of cohesion depends upon how well the unit can work as a smoothly functioning team to accomplish all missions in peace or war.

Department of the Army Field Manual 22-100, *Military*

*Leadership* (Oct. 1983), at 156. (Emphasis added). A soldier's courage and will under stress will be strengthened by the belief that his leaders and peers will try "to help him because they care for him." *Id.*

An important element of caring is remedial action to redress wrongs. For example, a leader is required to apologize to a soldier he or she has wronged. *Id.* at 279-82. Similarly, the government should be obligated to compensate, fully and fairly, soldiers injured by its negligence.

The *Feres* doctrine obviously undermines the military's goal of fostering high morale and cohesiveness among servicemembers. What is the impact on servicemembers of the judicial announcement that they are excluded from the full benefits of the system of justice they are willing to fight for? In his dissent in *Johnson*, Justice Scalia provided the clear answer:

After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the payment that they might have recovered had he been piloting a commercial helicopter at the time of his death.

481 U.S. at 700.

## **2. Suits By Servicemembers Do Not Undermine Military Discipline Nor Involve The Judiciary In Sensitive Areas.**

Despite the fact that their lawsuits are frequently dismissed, servicemembers continue to press claims for relief under the FTCA. See Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489, 511 nn. 129 & 130 (1982)(of 147 *Feres* cases

decided between 1955 and 1981, only eight were decided in the plaintiff's favor); Note, *United States v. Stanley: Has the Supreme Court Gone a Step Too Far?*, 90 W. Va. L. Rev. 473 (1987)(in 81 cases during 1981-87, only eight plaintiffs prevailed). Servicemembers have also brought suit under other statutes, such as the Privacy Act, 5 U.S.C. §552(a).

One commentator has observed:

[T]here is no evidence that negligence actions by servicemembers over the past twenty-five years have degraded the military mission.

The military soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, servicemembers have vigorously asserted their positions in direct court actions against high ranking officials. The proliferation of this constitutional litigation has apparently not interfered substantially with military operations.

Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. Rev. 24, 42 (1976). The government has never produced evidence that an FTCA suit has affected military discipline. See Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 St. Louis U.L.J. 383 (1985). In fact, the services report that discipline is at an all-time high. See, "The Military's New Stars," *U.S. News & World Rep.* (April 18, 1988) at p. 32.

Nor does the available evidence suggest that FTCA suits by service personnel would precipitate a flood of litigation which would embroil the judiciary in sensitive military matters.

Although a servicemember continues to serve after

retirement and his or her treatment at a military medical facility is deemed incident to that service, *McCarty v. McCarty*, 453 U.S. 210, 221-22 (1981), the *Feres* doctrine has never barred FTCA suits by retired service personnel for medical malpractice by government employees. See, e.g., *Watt v. United States*, 246 F. Supp. 386, 388 (E.D.N.Y. 1965). It appears that the armed forces settle most meritorious claims quickly, fairly, and efficiently at the administrative level. See H.R. Rep. No. B, accompanying H.R. 536 (June 15, 1989), 101st Cong., 1st Sess. at 8. ("During fiscal years 1984-1988, the government paid about \$60 million per year in malpractice settlements to dependents and retirees.") None of the concerns expressed by the Court in *Feres* and *Johnson* have materialized. There is no reason to believe that the result would be different in cases which *Feres* currently bars.

#### **B. THE AVAILABILITY OF BENEFITS UNDER THE VETERANS BENEFITS ACT DOES NOT JUSTIFY THE FERES DOCTRINE.**

In *Feres*, the Court found that Congress' provision for compensation under the Veterans' Benefit Act, 72 Stat. 1118, as amended 38 U.S.C. § 301 [VBA], to servicemen killed or injured in the line of duty, in the absence of an express provision to adjust for dual recoveries under the VBA and the FTCA, indicated that Congress did not foresee FTCA recovery by servicemembers. 340 U.S. at 144. The continued vitality of this Veterans' Benefits Rationale is not entirely clear. Compare *United States v. Johnson*, 481 U.S. at 689-90 (citing Rationale) with *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985)(indicating that this rationale is "no longer controlling") In any event, Amici suggest that the Veterans' Benefits Rationale does not support the continued existence of the *Feres* doctrine.

Congress was not obliged in provide an express

mechanism to avoid dual recovery under VBA and the FTCA. The FTCA makes the United States liable for the negligence of its employees "to the same extent as a private individual under like circumstances." 28 U.S.C. §2674. At the time of enactment, it was well settled that payments made by a tortfeasor to an injured party may be shown in mitigation or reduction of recovery. See, e.g., *Southwestern Brewery & Ice Co. v. Schmidt*, 226 U.S. 162 (1912).

In *Brooks v. United States*, 337 U.S. 49 (1949), the Court permitted two servicemen who were injured in an off-duty accident caused by a government employee to recover under the FTCA. The Court stressed that "nothing in the Torts Claim Act or the veterans laws . . . provides for exclusiveness of remedy." 373 U.S. at 53 Moreover, the Court observed that while the FTCA contained three exclusive provisions, 28 U.S.C. §§ 2672, 2676, and 2679, the Act is silent with respect to servicemembers as plaintiffs. *Id.* The Brooks Court indicated that VBA compensation would be offset against any FTCA recovery awarded a servicemember. *Id.* at 53-54. Upon remand, the Fourth Circuit ordered such an offset or adjustment. *Brooks v. United States*, 176 F.2d 482 (4th Cir. 1949). This result complies with the language of section 2674.

Moreover, the Veterans' Benefit Rationale proves too much. VBA benefits are not limited to injuries that are "incident to service." 38 U.S.C. §105. Yet the *Feres* bars only such claims.

Finally, the benefits that VBA provides are a grossly inadequate substitute for full recovery in tort. See Howland, *The Hands-Off Policy and Intramilitary Torts*, 71 Iowa L. Rev. 92, 133-37 (1985). The existence of veterans' benefits may salve society's conscience and make the *Feres* doctrine more palatable, *Hunt v. United States*, 636 F.2d 580, 598

(D.C. Cir. 1980). However, the availability of such partial, conditional alternative benefits does not justify depriving servicemembers of congressionally provided rights under the FTCA.

### C. THE FEDERAL RELATIONSHIP/UNIFORMITY RATIONALE DOES NOT JUSTIFY THE *FERES* DOCTRINE.

The original stated purpose of the Federal Relationship/Uniformity Rationale was to protect servicemembers who are unable to control their places of assignment from the vagaries of local law. Accordingly, the Court explained that Congress had substituted the certainty of recovery under the Veterans Benefits Acts for the possibility of nonuniform state court judgments. *Feres v. United States*, 340 U.S. 135, 140 (1950). Twenty-seven years later, the Court subtly shifted the emphasis of this rationale.

In *Stencil Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Court explained the Federal Relationship/Uniformity Rationale by stating that "as the Court held in *Feres* it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a servicemember who sustains service-connected injuries." *Id.* at 672.

Again the rationale offered in support of *Feres* proves too much. The relationship between the Government and a servicemember does not lose its distinctively federal nature when he or she suffers an injury that is *not* incident to service. Nor is local law any more uniform. Yet recovery is permitted for such injuries. See, e.g., *Brooks v. United States*, 337 U.S. 49 (1949); *Harvey v. United States*, 884 F.2d 854 (5th Cir. 1989).

Additionally, there is no reason to believe that the military's need for uniformity in this area is any different or superior to that of other federal agencies which have "unique nationwide functions." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 675 (1977)(Marshall, J., dissenting). Yet all other federal agencies are subject to negligence suits by citizens, the outcomes of which are dictated by the vagaries of local law. *Id.* The military itself is subject to suit suits by civilians. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

Finally, this Court has itself recognized the logical bankruptcy of the Federal Relationship/Uniformity Rationale. In *United States v. Muniz*, 374 U.S. 150 (1963), the Court permitted federal prisoners, who have even less control over their geographical location, to recover under the FTCA. The Court concluded that any problems of prison administration due to nonuniform recoveries "were more a matter of conjecture than reality." *Id.* at 161. At any rate, nonuniform recoveries could not be more prejudicial to the prisoners than uniform nonrecovery. *Id.* at 162.

The law has thus arrived at a cruel anomaly. Those who dedicate and risk their lives in the defense of America, its Constitution and its laws are deprived of those rights under the FTCA which are afforded even to those who have been convicted of violating and subverting the law. Amici respectfully suggest that granting the petition for certiorari in this case would afford this Court the opportunity to remove this anomaly by overruling the *Feres* doctrine or limiting its scope.

## II. THE ALMOST UNIVERSAL CRITICISM AND CONDEMNATION OF THE *FERES* DOCTRINE WARRANT REEXAMINATION OF THE DOCTRINE BY THIS COURT.

From its inception to the present time, the *Feres* doctrine has been subject to vigorous criticism and condemnation by scholars, practicing attorneys, and courts. See *United States v. Johnson*, 481 U.S. 691, 701 (Scalia, J., dissenting)(collecting authorities). Its recent extension in *Johnson* has served only to increase this criticism. See Petition for Certiorari at 10-11 (collecting authorities).

One observer has expressed the view that the *Feres* decision was motivated by the political pressures prevailing during the Korean War. DeDominicis, *Atomic Vets Take Their Case to Court*, 2 Cal. Law. 28, 31 (1982). DeDominicis' thesis may not be too wide of the mark. It is now known that the Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was influenced by public opinion. See W. Rehnquist, *The Supreme Court: How It Was, How It Is* 95 (1987).

Some of the strongest criticism of the doctrine takes the form of illustrating its bizarre results. See *In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1252 (E.D.N.Y. 1984)(hypothetical demonstrating the disparity of results in claims arising out of the same factual situation).

The outcomes of actual cases are no less perplexing. For example, *Feres* barred a serviceman's claim for negligence arising out of the crash of a military aircraft into his on-post home. *Orken v. United States*, 239 F.2d 850 (6th Cir. 1956). However, the doctrine did not bar a serviceman's claim for negligence arising out of the crash of a military aircraft into his off-post home. *Sapp v. United States*, 153 F. Supp. 496 (W.D. La. 1957). See also *United Airlines v. Wiener*, 335 F.2d 379, 404 (9th Cir.), cert. dism., 379 U.S. 951 (1964)(civilian passengers on an airliner which was negligently struck by an Air Force plane could recover

under the FTCA, but servicemember passengers could not).

The persistence of the *Feres* doctrine in the face of such inequitable results and the well-founded criticisms of the overwhelming majority of commentators undermines the public confidence in the fundamental fairness of the law. This Court has not hesitated to overrule its own precedents when "history and experience have conspicuously eroded" their foundation. See, e.g., *United States v. Reliable Transfer Co.*, 420 U.S. 397, 410-11 (1975); *Executive Jet Aircraft, Inc. v. City of Cleveland*, 409 U.S. 249, 266-68 (1972); *Thammel v. United States*, 445 U.S. 40, 51-53 (1980).

### III. THE FACT THAT CONGRESS HAS NOT OVERTURNED THE *FERES* DOCTRINE SHOULD NOT PRECLUDE ITS REEXAMINATION BY THIS COURT.

Congressional silence concerning the *Feres* doctrine, while unfortunate, hardly provides a sound basis for continuing this harsh rule. Inaction simply sheds no light on legislative intent. This Court has acknowledged that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). Moreover, the *Feres* doctrine is, after all, a judicial, not legislative creation. "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." *Id.* at 119.

The fact is that Congress has enumerated the exceptions to the FTCA. In engraving an additional exception onto the Act, the Court has introduced needless complexity and inequity into Congress' provisions for compensation of citizens injured by the negligence of government employees. Surely the task of rectifying the inequitable treatment of servicemembers under the Act

does not fall solely to the Congress.

Servicemembers and their families sacrifice much for their country and ask little in return. Petitioners in this case seek no special treatment due to their military status. They seek only the same right to seek compensation for the negligence of a governmental employee that is afforded all other citizens. Indeed, this case presents a particularly stark demonstration of the inequity of the *Feres* doctrine. It was purely fortuitous that civilians were not injured or killed in the vehicular accident which took the lives of decedents. Those civilians or their families would have been entitled to maintain an action under the FTCA, while petitioners' actions were barred. Moreover, none of the rationales advanced in support of the *Feres* doctrine justifies this discrimination under such circumstances.

Amici urge this Court to end the treatment of servicemembers as second-class citizens by overruling *Feres*. Alternatively, this Court should limit the scope of *Feres* to bar only suits for on-duty injuries arising from the mission essential operations of the Armed Forces. It should exclude from the scope of *Feres* suits for injuries arising from off-duty accidents, recreational accidents, and medical malpractice in connection with self-referral or elective procedures.

## CONCLUSION

For these reasons, amici urge this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

Russell H. Putnam, Jr.\*  
1022 Calhoun St.  
Columbia, S.C. 29211  
(803) 799-9435  
*Attorney for Amici Curiae*

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